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**Datasheet for the interlocutory decision
of 17 November 2009**

Case Number: T 1427/09 - 3.5.05

Application Number: 01962282.8

Publication Number: 1325580

IPC: H04L 1/00

Language of the proceedings: EN

Title of invention:

Systems and methods for communicating spread spectrum signals using variable signal constellations

Applicant:

Ericsson Inc.

Headword:

Electronic filing of appeals/ERICSSON

Relevant legal provisions:

EPC R. 2(1),(2), 50(3)

Decision of the President of the European Patent Office dated 12 July 2007 concerning the electronic filing of patent applications and other documents

Decision of the President of the European Patent Office dated 26 February 2009 concerning the electronic filing of documents

Keyword:

"Electronic filing of appeal documents without required enhanced electronic signature of an authorised person - subsequent filing of signed documents under Rule 50(3) EPC (yes)"

Decisions cited:

T 0665/89, T 0765/08, T 1090/08

Catchword:

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Case Number: T 1427/09 - 3.5.05

I N T E R L O C U T O R Y D E C I S I O N
of the Technical Board of Appeal 3.5.05
of 17 November 2009

Appellant:

Ericsson Inc.
6300 Legacy Drive
1 MS EVW 2-C-2
Plano, TX-75024 (US)

Representative:

Kühn, Friedrich Heinrich
Ericsson AB
Patent Unit Radio Networks
164 80 Stockholm (SE)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 9 March 2009
refusing European patent application
No. 01962282.8 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: D. H. Rees
Members: M. Höhn
F. Blumer

Summary of Facts and Submissions

- I. The present appeal is against the decision of the examining division dispatched 9 March 2009, refusing European patent application 01962282.8. The notice of appeal and the statement setting out the grounds of appeal in the present proceedings were both filed by way of electronic filing on 11 May 2009 and on 17 June 2009, respectively (in the pdf format).
- II. The notice of appeal carried the name of Mr. Friedrich Kühn, European Patent Attorney, but no handwritten signature. The electronic filing of said document on 11 May 2009 was certified by a signature authentication showing that both the sender certificate and the signer certificate underlying said filing were issued to I. Elfving.
- III. The statement setting out the grounds of appeal carried the name of Mr. Friedrich Kühn as well as a handwritten signature. The electronic filing of said statement on 17 June 2009 was certified by a signature authentication showing that both the sender certificate and the signer certificate underlying said filing were issued to R. Ahlund.
- IV. In a communication dispatched 8 September 2009 the board referred to the applicable rules on the electronic filing of documents (Decision of the President of the EPO dated 26 February 2009 concerning the electronic filing of documents, OJ EPO 2009, 182 - hereinafter the "2009 Decision"), under which the authenticity of documents filed in appeal proceedings "shall be confirmed by means of an enhanced electronic

signature of a person authorised to act in the proceedings in question" (2009 Decision, Article 8(2)). The board noted that apparently neither Mr. or Ms. Elfving nor Mr. or Ms. Ahlund were authorised to act in the present proceedings and that, consequently, the notice of appeal and the statement setting out the grounds of appeal were deemed not to be signed. In accordance with Rule 50(3) EPC, the appellant was invited to file signed copies of said documents within two months.

- V. By telefax letter received on 20 October 2009, the appellant filed copies of the notice of appeal (dated 11 May 2009) and the statement setting out the grounds of appeal (dated 17 June 2009) which both carried a handwritten signature of Mr. Kühn, the professional representative recorded for the present proceedings.

Reasons for the Decision

1. This interlocutory decision concerns only the issue of the electronic filing of the notice of appeal and the statement setting out the grounds of appeal.
2. Electronic filings of documents shall be made online or on admissible electronic data carriers (2009 Decision, Article 5(1)). Under Article 8(2) of the 2009 Decision, "[t]he authenticity of documents filed in appeal proceedings (...) shall be confirmed by means of an enhanced electronic signature *of a person authorised to act in the proceedings in question*" (emphasis added). The 2009 Decision entered into force on 5 March 2009

- (Article 14). It is therefore applicable to the present appeal proceedings.
3. Before the 2009 Decision was effective, documents in appeal proceedings were excluded from electronic filing (see the overview given in decision T 1090/08 and the Decision of the President of the European Patent Office dated 12 July 2007 concerning the electronic filing of patent applications and other documents (OJ EPO 2007, Special Edition No. 3, page 12), hereinafter "2007 Decision"). Under the 2007 Decision, an appeal filed through the epoline® online filing system was deemed not to have been filed in view of Rule 2(1) EPC (T 765/08).
 4. Under the 2009 Decision, documents in appeal proceedings are no longer excluded from electronic filing, but special provisions apply regarding the confirmation of the authenticity of such documents (see the provisions quoted above, point 2).
 5. In the present case, the appeal documents were electronically filed using the technical means of communication addressed in Rule 2(1) EPC and defined in Article 5(1) of the 2009 Decision. The dates of transmission and receipt (11 May 2009 for the notice of appeal and 17 June 2009 for the statement setting out the grounds of appeal) were verified by the acknowledgements of receipt issued by the EPO.
 6. As the electronic signatures used for the electronic filing of the appeal documents were not issued to a person authorised to act in the present proceedings (as required by Article 8(2) of the 2009 Decision) but to other individuals (I. Elfving and R. Ahlund), the

applicable requirements concerning the authentication of the documents were not met. The 2009 Decision is silent on the legal consequences of any non-compliance with its Article 8(2).

7. Rule 2 EPC, on which the 2009 Decision is based, authorises the President of the EPO to specify technical means of communication for the filing of documents (Rule 2(1) EPC) and to permit appropriate means for document authentication where the EPC provides that a document must be signed (Rule 2(2) EPC). Rule 2(1) EPC provides for legal consequences in cases where documents are filed through non-approved technical means of communication (T 765/08, point 9 of the reasons). On the other hand, Rule 2(2) EPC does not specify the legal consequences for any non-compliance with requirements concerning signatures and other means of document authentication.

8. For documents filed after the filing of the application without the required signature, Rule 50(3) EPC provides that the EPO shall invite the party concerned to sign the document within a time limit to be specified. It is appropriate and not in conflict with Rule 2 EPC to apply Rule 50(3) EPC to documents filed electronically in appeal proceedings without the electronic signature required under Article 8(2) of the 2009 Decision. In the board's judgment, the principle that the signature of an unauthorised person shall be treated like a missing signature (T 665/89, point 1.4 of the reasons) should apply not only to handwritten signatures but also to electronic signatures. Consequently, the electronic filing of a document in appeal proceedings accompanied by the electronic signature of an

unauthorised person should be treated under Rule 50(3) EPC like the filing of an unsigned document per mail or telefax in the same proceedings.

9. Since signed copies of the notice of appeal and the statement setting out the grounds of appeal were filed within the time limit set in the communication of 8 September 2009 (see above Summary of Facts and Submissions, points IV and V), said documents retain their original date of receipt (Rule 50(3) EPC, third sentence).

Order

For these reasons it is decided that:

1. The notice of appeal is deemed to be signed and to have been filed on 11 May 2009.
2. The statement setting out the grounds of appeal is deemed to be signed and to have been filed on 17 June 2009.

The registrar:

The chair:

K. Götz

D. H. Rees